No. 557

In The Supreme Court of THE UNITED STATES.

OCTOBER TERM, 1897.

Filed Jan. 10, 1898.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error,

vs.

ALEXANDER ANDERSON,

Defendant in Error.

BRIEF ON MOTION TO DISMISS WRIT OF ERROR.

PHELP & PHELPS,
ATTORNEYS FOR DEFENDANT IN ERROR,
Grafton, North Dakota.

BATES THE PRINTER, GRAFTON, N. D.

In The Supreme Court of

THE UNITED STATES,

OCTOBER TERM, 1897.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

THE FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

ALEXANDER ANDERSON,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS.

In order for the Supreme Court of the United States to acquire jurisdiction under §709 U. S. R. S., the decision of the Federal question must 4
appear to have been necessarily involved in the determination arrived at in the State Court; (Armstrong vs. Treasurer, 16 Peters, 281; Mills vs. Brown, 16 Peters, 525), so that the State Court could not have given a judgment without deciding it; (Parmelee vs. Lawrence, 11 Wall. 36; affirming R. R. Co. vs. Rock, 4 Wall., 177;

5 Gill vs. Oliver, 11 How., 529; Millingar vs. Hartupee, 6 Wall., 258; Fowler vs. Lamson, 17 S. Ct. Rep., 112.)

Where the decision is made in the State Court on settled pre-existing rules of general jurisprudence, the case cannot be brought here for review. (Bank of West Tennessee vs. Citizens' Bank, 14 Wall., 9; Palmer vs. Marston,
6 14 Wall., 10.; Sevier vs. Haskell, 14 Wall., 12; Delmas vs. Ins. Co. 14 Wall., 661; C. & N. W. Ry. Co. vs. City of Chicago, 17 S. Ct. Rep., 129, decided Nov. 30th, 1896.)

In the case at bar, the assignments of error alieged by plaintiff in error all center at one point, viz, that under the statutes of the United States relating to national banks, it was not with-
7 in the power of plaintiff in error to become the agent of defendant in error to sell the seven promissory notes in suit to a third person, even though the evident object of such sale was to apply the proceeds of this sale of the collateral paper, first to the payment of the two thousand
8 ($2000) dollar loan made by the bank to Mr. Anderson, and second, for the bank to remit to Mr. Anderson the balance. The assignments of error also allege that that under such statutes, it was not within the powers of the cashier of a national bank to bind his bank by contract to assume the duties and obligations of an agent for the sale of notes and mortgages to third persons.

We contend that the decisions of the State Courts upon these questions, in the case at bar,

were not necessarily involved in the determination at which they arrived. Our complaint alleges, Paragraph 4, that the seven notes in suit were deposited by Mr. Anderson with the bank as collateral security for the $2000.—loan which had been made to him by the bank. This allegation is admitted by paragraph four (4) of defendant's answer. We further allege in our complaint (Par 6) that the defendant below wrongfully converted the notes to its own use. The evidence fully substantiates this allegation. The Supreme Court of the State of North Dakota holds in its opinion on the fourth appeal (72 N. W. Rep. 916-921) as follows:—"The question of ultra vires has been already discussed in a previous opinion. See 67 N. W., 821. We have nothing to add on that point, except that *the question appears to us to be immaterial.* The plaintiff, when it authorized a sale by defendant as its agent, did, in contemplation of law, decline to sell to the agent on the terms agreed, or any terms; there being no evidence that he ever assented to the purchase of the notes by the agent itself. A principal always, in contemplation of law, is in the attitude of being unwilling to sell to the agent on any terms. Whether the defendant was authorized by the law to act as agent for the plaintiff *is therefore of no moment*, because, even if we concede this proposition, it still remains true that he has never agreed to a purchase of the notes by the defendant; and hence it follows that the defendant's assumption of ownership of them, as

though plaintiff had assented to a purchase of them by defendant, constituted a conversion thereof. * * * What we said in our opinion on the third appeal on the subject of the authority of the cashier to bind the defendant by creating the relation of principal and agent between plaintiff and defendant is still applicable to the case on the record now before us. *In its answer* and the brief of its counsel the defendant admits that the writing of the letters referred to was *its* act, and not the act of an authorized agent. By its own pleading and admission it has precluded itself from raising the point that the cashier had no power to bind it by agreeing that the bank would act as agent for the plaintiff."

It readily and very manifestly appears, therefore, that the judgment of the State Court was not based upon the decision of either of the two propositions relied upon by plaintiff in error in its assignments of errors. The decision of no Federal question was necessarily involved in the judgment at which the State Court arrived.

The case was disposed of on general principles of law. The notes in suit had been left with the defendant bank as collateral security. The bank, without leave of plaintiff, entered them up in its "Bills Receivable" register, as its own property, on October 7th, 1891, and has exercised acts of ownership over them ever since, having collected five of the notes as its own property. This certainly constituted a conversion of the paper, and rendered it liable to Mr. Anderson for the value thereof. Whether the correspondence be-

tween the parties did or did not create the relation of principal and agent between them, whether the bank did or did not have power to act as Mr. Anderson's agent, and whether the cashier did or did not have power to bind his bank by contract to assume such agency,—the fact still remains that the bank did convert the collateral notes in suit, and upon this conversion, the judgment of the court below was based, irrespective of the question of *ultra vires.*

On a motion of this nature, when the case has manifestly been decided right in the court below, the writ of error should be dismissed and the judgment below affirmed, and the case ought not to be held for further argument.

(Arrowsmith vs. Harmoning, 118 U. S., 194; Church vs. Kelsey, 121 U. S., 282.)

We believe, under the circumstances of this case, we are justified in asking that damages of ten per cent upon the amount of the judgment, as mentioned in Rule 23 of this Court, be awarded to defendant in error, as well as costs of this motion. The original action was commenced nearly five years ago. It has already been passed upon on four appeals, a new trial having been awarded plaintiff below, on each of the first three appeals. The rate of interest in the notes converted was nine per cent per annum, while the legal interest recoverable in this action is but seven per cent.

(See Anderson vs. Bank, 72 N. W. Rep., 916-918.)

The language of the Supreme Court of North Dakota on the last appeal was explicit in stating

that it would have arrived at the same conclusion at which it did arrive, even had it conceded the contention of plaintiff in error on the Federal question sought to be raised. Plaintiff in error must have known this before it sued out the writ of error which brought the case here; but it has brought the case to this court in spite of the immateriality of the Federal question,—apparently for delay only; and we therefore believe, in view of all the circumstances, defendant in error should be awarded the damages mentioned, as well as a dismissal of the writ and an affirmance of the judgment below.

Respectfully submitted,

December 15th, 1897.

PHELPS & PHELPS,

Attorneys for Defendant in Error,

Grafton, North Dakota.